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Stephen Vladeck

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IS “NATIONAL SECURITY LAW” INHERENTLY PARADOXICAL?

STEPHEN I. VLADECK*

I’m perhaps the last person who should be asking the question at the heart of this essay—whether “national security law” really deserves to be its own independent field of study, and, in that vein, an appropriate subject for field-specific publications such as this one. I offer this caveat at the outset not just because it is perhaps a bit unbecoming on my part to use the pages of a publication to question the entire project to which that publication is dedicated, but because it is also potentially hypocritical on a more personal—or at least professional—level. After all, I am a national security law professor who was hired at least largely as such; I am currently the Chair of the Association of American Law Schools’ Section on National Security Law; and I am a senior editor of the *Journal of National Security Law and Policy*.¹ Put simply, without “national security law,” I might well be unemployed.²

Nevertheless, the more time that I spend thinking about, writing, and teaching “national security law,” the less I understand what “it” is as a unified whole—and the less comfortable I am with what it has increasingly become. To be sure, there are classical topics that were already understood to be part of the national security law “canon” long before September 11. Thus, the few pre-9/11 casebooks in the field³ devoted long chapters and detailed discussion to the constitutional allocation of war powers, the international law pertaining to the use of force, the statutory and constitutional authorities pertaining to the domestic use of the military, the internal law actually *governing* the military, the practical and legal background to intelligence operations and intelligence gathering (and

* Professor of Law, American University Washington College of Law.

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2 To be fair, my own teaching and research interests sweep well beyond national security law. But I suspect that there are a not-insignificant number of junior law professors who were hired largely to teach national security law, whether or not that was an element of their ideal course package.

3 See, e.g., STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW (1990); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW (1987); JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW (1990); STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW (1990).

congressional oversight thereof), mechanisms for preserving governmental secrecy and the protection of classified information, and similar matters.⁴ In theory, these areas were easily understood to constitute the separate subject of “national security law” at least largely because they *didn’t* comfortably fit either together or within any other preexisting topics,⁵ even if many of the particular sets of legal issues seemed little more than unrelated historical curiosities or entirely academic subjects of debate.⁶ Going forward, there is little reason to think these topics are any less central to the field of national security law, or any less deserving of our focus than they were a decade ago.

From a pedagogical and curricular perspective, though, the aftermath of September 11 has dramatically reoriented the field, so much so that authors of one of the leading casebooks on national security law⁷ have gone so far as to extract from later editions an entirely separate casebook on “Counterterrorism Law.”⁸ To similar effect, new casebooks have emerged in recent years on “Terrorism and the Law,”⁹ “Legal Responses to Terrorism,”¹⁰ “Antiterrorism and Criminal Enforcement,”¹¹ “Law and Bioterrorism,”¹² and “Global Perspectives on Counterterrorism,”¹³ among numerous others. Indeed, many of these books are now into their second and third post-September 11 editions—as their authors confront the inherent difficulty of trying to cover a field in which foundational or paradigm-shifting developments seem to take place almost every day.¹⁴

These are merely discrete data points, of course, and to conclude that there is a greater volume of topics to discuss in national security law is not to say anything about the shifting content of the field. But if nothing else, it does appear to be beyond question that the government’s authority to respond to the various threats posed by transnational terrorism is likely to become a permanent (if not dominant) fixture of almost any national security law curriculum going forward, even though we have never had a serious conversation about the normative desirability or the pedagogical consequences of such a shift.

And yet, it is worth stopping to point out that there is an important qualitative difference between what we used to understand “national security law” to encompass and what it necessarily encompasses today, in what we might come to call the age of counterterrorism. Rather than just an

4 Indeed, the volume by John Norton Moore and his coauthors is perhaps better described as an anthology of these issues than a casebook.

5 See generally Stephen Dycus, *The Law Teacher as Peacemaker: National Security in the Classroom*, 55 J. LEGAL EDUC. 42, 43 (2005) (noting that the author’s first casebook on the subject contained aspects of constitutional law, administrative law, procedure, and history).

6 See, e.g., Scott L. Silliman, *Teaching National Security Law*, 1 J. NAT’L SEC. L. & POL’Y 161, 163 (2005) (citing the use of the political question doctrine and the War Powers Resolution during the Vietnam Conflict as historical examples of national security law).

7 See STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW (4th ed. 2007).

8 STEPHEN DYCUS ET AL., COUNTERTERRORISM LAW (2007).

9 GREGORY E. MAGGS, TERRORISM AND THE LAW: CASES AND MATERIALS (2005).

10 WAYNE McCORMACK, LEGAL RESPONSES TO TERRORISM (2d ed. 2008).

11 NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT (3d ed. 2008).

12 VICTORIA SUTTON, LAW AND BIOTERRORISM (2003).

13 AMOS N. GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM (2007).

14 See, e.g., ABRAMS, *supra* note 10, at 2 (describing the rapid pace of change in the field).

amalgamation of *sui generis* bodies of law dealing with discrete and usually war-related topics, national security law today is increasingly about the extent to which entirely ordinary substantive doctrines may or may not necessitate extraordinary exceptions based upon “national security” considerations.

Put differently, there is now a robust Fourth Amendment jurisprudence of national security.¹⁵ There is a less-robust but clearly emerging Fifth Amendment jurisprudence of national security.¹⁶ There may even be a growing *Sixth* Amendment jurisprudence of national security,¹⁷ at least to the extent that amorphous “national security” considerations have begun to surface in certain types of Confrontation Clause analysis.¹⁸ More generally, a long list of scholars, commentators, and even former jurists have endorsed calls for a “national security *court*”—an entirely separate judicial tribunal for certain kinds of national security-related lawsuits.¹⁹ And even remedial doctrines that were never understood by reference to “national security” have increasingly been construed to exclude certain categories of “national security” cases from their sweep.²⁰

In short, national security law is increasingly part of the fabric of far more conventional courses and doctrines—it is one part criminal procedure, one part evidence, one part substantive criminal law, one part constitutional law, and even one part administrative law. And the reverse is just as true: criminal procedure today is partly national security law. Evidence today is partly national security law. And so on. Even in areas as seemingly unrelated as banking regulation,²¹ telecommunications

15 As just one example, consider the recognition by the Foreign Intelligence Surveillance Court of Review—in only its second published decision ever—of a categorical “foreign intelligence surveillance” exception to the Fourth Amendment’s Warrant Clause. *See In re Directives . . . Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004, 1010–12 (FISA Ct. Rev. 2008) (analogizing the Foreign Intelligence Exception to the Warrant Clause which the Supreme Court has not ruled upon with the Special Needs Exception, which the Court has validated).

16 *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (holding that the Due Process Clause bars the potentially indefinite detention of immigrants pending their deportation, but noting that the decision did not consider “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security”).

17 *See, e.g., United States v. Abu Ali*, 528 F.3d 210, 240–41 (4th Cir. 2008) (explaining that national security and counterterrorism considerations qualify as an “important public policy” weighing in favor of the introduction at trial of deposition testimony taken outside the presence of the defendant notwithstanding the Confrontation Clause).

18 *See generally* Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 TEX. L. REV. 1501, 1520–23 (2010) (explaining how “national security” concerns affected the Fourth Circuit’s Confrontation Clause analysis).

19 *See, e.g.,* GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* (2009). For a critique of these proposals, see Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505 (2009).

20 *See, e.g., Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (holding that courts should decline to infer *Bivens* remedies in “rendition” cases because of the various national security concerns such relief would implicate), *cert. denied*, 130 S. Ct. 3409 (2010). I have argued elsewhere that such analysis has the relevant considerations entirely backwards. *See* Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010).

21 *See, e.g.,* Eric Lichtblau & James Risen, *Bank Data is Sifted by U.S. in Secret to Block Terror*, WASH. POST, June 23, 2006, at A1. Eric Lichtblau & James Risen, *Bank Data is Sifted by U.S. in Secret to Block Terror*, NEW YORK TIMES, June 23, 2006, available at <http://www.nytimes.com/2006/06/23/washington/23intel.html>.

law,²² and the First Amendment,²³ just to name a few, one need not look particularly hard these days to find pressing questions that stem at least in part from claims that the current national security climate somehow alters—or provides a justification for departure from—the preexisting norm.²⁴ For a field that had virtually no full-time tenure-track teachers at the beginning of the last decade, national security law has not just become ubiquitous in U.S. law schools, but national security scholars have, oddly enough, become quasi-generalists in order to understand the broader legal doctrines and bodies of jurisprudence into which their field has increasingly expanded.

From the perspective of academic employment opportunities, this shift is almost certainly welcome. But I fear that, at the theoretical level, one could just as easily paint these developments as a strange but sure example of the “normalization of emergency,” or what Harold Lasswell famously described as the “Garrison State”²⁵—the idea that the more we specifically think about and provide for how the law should accommodate exceptional cases, the more the exceptions will normalize into the rule. And therein lies the rub: the questions for the courts in all of these cases become whether the national security concerns justify creating a separate body of doctrine—new rules for new cases—or whether extant doctrine can adequately account for the government’s arguably unique (and undeniably compelling) interests in preventing future acts of terrorism. Thus, to accept the project of “national security law” in its entirety is to accept, at a fairly fundamental level, the notion that there *should* be special rules in these special cases—it is to have a clear position as to a fairly fundamental intellectual question at the heart of our field. Otherwise, there would be no need to teach, discuss, or write about these cases separately from the coverage they would receive as part of ordinary doctrine in more traditional coursework.²⁶

To illustrate the point, consider the so-called “special needs” doctrine in Fourth Amendment jurisprudence, which traces its origins to a series of decisions in the 1980s. The doctrine exists to allow certain mass, warrantless, suspicionless searches when “the ‘special need’ that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement.”²⁷ So long as the state is not really trying to evade the warrant requirement in the ordinary context of law enforcement, “special needs” may provide justification for searches that the Fourth Amendment might otherwise prohibit.

Thus, the Supreme Court under the special needs doctrine has approved random drug testing of

22 See, e.g., *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (describing a case brought by AT & T customers alleging the company was collaborating with the National Security Agency in performing illegal, warrantless surveillance of domestic and foreign communications).

23 In a pair of high-profile cases in 2002, the Third and Sixth Circuits split on whether the “Creppy Memo,” which ordered the categorical closure to the public of any deportation proceeding deemed to be of “special interest,” violated the First Amendment. Compare *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

24 See, e.g., John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765 (2007).

25 Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 455, 455 (1941).

26 For more on this point, see Stephen I. Vladeck, *Foreword: National Security’s Distortion Effects*, 32 W. NEW ENG. L. REV. 285 (2010).

27 *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001).

student athletes,²⁸ drug tests for certain U.S. Customs Service employees,²⁹ drug and alcohol tests for railway employees involved in accidents or other safety violations,³⁰ checkpoints for witnesses to a recent hit-and-run accident,³¹ and highway sobriety checkpoints,³² among others. The Court has also emphasized the need carefully to cabin the special needs “exception,” striking down drug interdiction checkpoints in Indianapolis³³ and urine tests for obstetrics patients in South Carolina³⁴ based on the conclusion that the checkpoints were primarily meant to serve a traditional law-enforcement purpose.

And yet, when New York City instituted a program for mass, suspicionless searches of passengers entering its subway system after the 2005 attack on the London Underground, the program was upheld by both the district court and the Second Circuit pursuant to the special needs doctrine.³⁵ As Judge Straub explained for the Court of Appeals, “preventing a terrorist attack on the subway is a ‘special’ need within the meaning of the doctrine,”³⁶ since.

As a legal matter, courts traditionally have considered special the government’s need to “prevent” and “discover . . . latent or hidden” hazards, in order to ensure the safety of mass transportation mediums, such as trains, airplanes, and highways. We have no doubt that concealed explosives are a hidden hazard, that the Program’s purpose is prophylactic, and that the nation’s busiest subway system implicates the public’s safety. Accordingly, preventing a terrorist from bombing the subways constitutes a special need that is distinct from ordinary post hoc criminal investigation.³⁷

The merits of the Second Circuit’s holding aside, it seems fairly clear that random, suspicionless searches on mass public transportation systems are a fairly significant step past the carefully circumscribed circumstances in which the Supreme Court had previously applied the “special needs” doctrine. At the very least, the fact that preventing transnational terrorism *includes* a heavy law-enforcement and criminal law-based emphasis poses a tension between the normative persuasiveness of the claim that preventing terrorism is “special,” and the doctrinal coherence of relying on unrelated prior precedents to justify the searches.³⁸

28 See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664 (1995).

29 See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989).

30 See *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 633 (1989).

31 See *Illinois v. Lidster*, 540 U.S. 419, 427–28 (2004).

32 See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 456 (1990).

33 See *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000). [Same as n.27.]

34 See *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). [Same as n.27.]

35 *MacWade v. Kelly*, 460 F.3d 260, 275 (2d Cir. 2006).

36 *Id.* at 263.

37 *Id.* at 270–71.

38 The same can be said about the debate over whether FISA warrants can be used to obtain evidence for use in ordinary criminal prosecutions. Before the USA PATRIOT Act of 2001, courts had conditioned the validity of FISA warrants on the government’s assertion that the “primary purpose” of the surveillance was to gather foreign intelligence. The USA PATRIOT Act relaxed that requirement to “significant purpose,” and in the process greatly increased the likelihood that evidence obtained through FISA would make its way into run-of-the-mill criminal cases. *Compare, e.g., In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002) (upholding this provision in the USA PATRIOT Act), *with* *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1042–43 (D. Or. 2007) (holding that the “significant purpose” standard violates the Fourth Amendment).

To similar effect is a recent development in Confrontation Clause jurisprudence: In an unprecedented situation, federal prosecutors arranged to depose Saudi intelligence officials via live two-way video link in order to corroborate inculpatory statements made by Ahmed Omar Abu Ali, a U.S. citizen suspected of involvement in various terrorist plots, while in Saudi custody.³⁹

Although the Sixth Amendment's Confrontation Clause generally requires that the defendant be present in such circumstances, the Supreme Court had previously recognized an exception for cases in which the testimony in the defendant's absence is "necessary to further an important public policy," and "the reliability of the testimony is otherwise assured."⁴⁰ As to the first part of the test set out in *Maryland v. Craig*, the Fourth Circuit concluded in *Abu Ali* that the specific interest in preventing terrorism was a sufficiently important public policy. As the Court of Appeals explained, "[t]he prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is . . . just the kind of important public interest contemplated by the *Craig* decision."⁴¹ Moreover, "[i]f the government is flatly prohibited from deposing foreign officials anywhere but in the United States, this would jeopardize the government's ability to prosecute terrorists using the domestic criminal justice system."⁴²

Thus, because "requiring face-to-face confrontation here would have precluded the government from relying on the Saudi officers' important testimony,"⁴³ the court sustained the district court's accommodation. And in the process, the court distinguished a seemingly contraindicated decision by the en banc Eleventh Circuit,⁴⁴ focusing on the absence of national security considerations in that case: "Whatever the merits of the holding in *Yates*, the defendants there were charged with mail fraud, conspiracy to commit money laundering, and drug-related offenses, crimes different in both kind and degree from those implicating the national security interests here."⁴⁵ In other words, national security concerns provided a compelling example of an "important public policy" in a context where analogous concerns about prevention and punishment had previously proved inadequate.

The point of these examples is not to criticize either court's invocation of national security concerns, or to disagree with their handling of the merits—a point on which I suspect reasonable people can agree to disagree. Rather, these cases exemplify the distortion effect that national security considerations are having, and will continue to have, on otherwise well-established and settled bodies of doctrine—be it the special needs doctrine in the context of the Fourth Amendment, or the *Craig* rule in the context of the Confrontation Clause. Nor is this effect limited to the cases noted above; one need not look far to find allusions to the unique challenges posed by the threat of transnational

39 See Vladeck, *supra* note 17 (discussing the case in thorough detail).

40 *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

41 *United States v. Abu Ali*, 528 F.3d 210, 241 (4th Cir. 2008).

42 *Id.*

43 *Id.*

44 See *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (en banc) (holding that a live, two-way video conference testimony on a television monitor violated defendants' Sixth Amendment confrontation clause rights).

45 *Abu Ali*, 528 F.3d at 242-43 n.12 (citation omitted).

terrorism across the jurisprudential landscape.⁴⁶ The question then becomes whether the courts are better off creating a hermetically sealed body of specialized “national security law” for those cases (as a means of protecting extant doctrine and preventing its distortion), or whether they find ways to adapt extant doctrine to account for the unique challenges such cases pose.

This is why I find the conversation over the status of “national security law” as a field distinct from similar debates that have preoccupied scholars in a number of other legal fields in recent years.⁴⁷ I suspect there is less of a fundamental disagreement in, for example, mass media law or environmental law, over whether it is anathema to core constitutional values to even *have* a special body of law to govern these cases. In those areas, at least, such a conversation is a policy debate, rather than one fraught with constitutional difficulties.

To be frank, I have conflicting views as to what the “answer” is and should be. It is certainly true that, even without counterterrorism law, there is still plenty of doctrine to teach in a more classical (*i.e.*, pre-September 11) type of national security course. But I also suspect that those who teach and write about national security law however defined, including in the pages of this and future issues of the *National Security Law Brief*, would do well to spend more time asking what *justifies* a separate corpus of law for national security cases.

46 Post-9/11 national security considerations also pose challenges for areas more traditionally part of national security law, including the difficulty of applying international humanitarian law to non-state actors such as al Qaeda. *See, e.g.*, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (Motz, J., concurring) (asserting that enemy combatant status cannot be conferred on a member of a non-state terrorist organization, as such an organization cannot be engaged in international hostilities for the purposes of the Third Geneva Convention).

47 For a lucid discussion, *see* Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Taxonomy*, 95 CORNELL L. REV. 221 (2010).